84-1323

No.

Office Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1984

LEWIS T. PERRY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether this decision stands for the proposition that before a Defendant can make "credible" showing of "standing" in a Fourth Amendment claim, he is required to take the stand and testify?

-OR-

2. Whether a Defendant can cross the threshold of "standing" in a Fourth Amendment claim through independent witnesses and Exhibits?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Lewis T. Perry prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit, and shows as follows:

OPINION BELOW

The first published opinion of the United States Court of Appeals for the Eleventh Circuit is appended to this Petition as Appendix A and is cited as *U. S. v. Lewis T. Perry*, No. 83-8695, 740 F.2d 854 (1984) (Eleventh Circuit). The second published opinion of the United States Court of Appeals for the Eleventh Circuit is appended to this Petition as Appendix B and is cited as *U. S. v. Lewis T. Perry*, No. 83-8695, ... F.2d ..... (1984) (Eleventh Circuit). The denial of the petition for rehearing is appended to this Petition as Appendix C.

JURISDICTION

The first opinion of the United States Court of Appeals for the Eleventh Circuit was entered on August 29, 1984. The second opinion of the United States Court of Appeals for the Eleventh Circuit was entered on November 13, 1984. Petitioner's petition for rehearing, timely filed, was denied on December 20, 1984. Petitioner verily believes that the Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; has further decided an important question of federal law which has not been, but should be, settled by this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Whether the Petitioner's Fourth and Fifth Amendment rights under the Constitution of the United States were denied?

STATEMENT OF THE CASE

This Petitioner was initially tried before a jury in the United States District Court for the Middle District of Georgia, Columbus Division, for distributing cocaine and possessing cocaine with intent to distribute. Lewis T. Perry was found guilty by the jury and sentenced by the Court to five years in the penitentiary.

Following said conviction sentence, Petitioner appealed his judgment of conviction and sentence entered thereon to the United States Court of Appeals for the Eleventh Circuit, and that Court affirmed in part, reversed in part, and remanded to the lower Court. See Appendix A for that Court's opinion.

The Court of Appeals remanded because:

> It is unclear from the hearing transcript whether the district court's ruling rested on a credibility determination, a conclusion that the situation described by the witnesses could not support a legitimate expectation of privacy, or a combination of both. We are, of course, reluctant to speculate as to the actual basis of the ruling. And *inasmuch as they may lead to different results* (emphasis added), we are unable to dispose of Perry's claim by exploring all of the various possibilities.

On remand, the District Court entered additional findings of fact identifying its basis for determining that Petitioner failed to establish standing to contest the search of Petitioner's place of business.

The District Court, without receiving any additional evidence belatedly decided that Petitioner failed to establish "standing" for two reasons:

(a) Defendant's witnesses were not credible (notwithstanding the fact the government offered no evidence to rebut anything they said, and simply *ignored* a certificate of occupancy and business license in Petitioner's name);

(b) The defense failed to establish a search occurred (notwithstanding the fact that the defense was prevented from doing so by the Court's decision on the first reason above-cited).

The District Court's additional findings are appended to the second opinion of the Court of Appeals (See Appendix B).

The Court of Appeals, after the filing of the District Court's additional findings, decided Petitioner's Fourth Amendment and sufficiency claims by affirming the conviction on November 13, 1984.

Petitioner timely filed a motion for rehearing and said motion was denied on December 20, 1984.

Although there were several questions on appeal in the United States Court of Appeals for the Eleventh Circuit, Petitioner asks this Court to review Section III of this Court's first opinion, and Sections 1 and 2 of this Court's second opinion, which deal with the questions presented in this writ of certiorari.

STATEMENT OF FACTS

In the case at bar, Petitioner leased the building located at 1493 Cusseta Avenue containing his business which was a karate and dance studio. Petitioner produced as a witness the owner of the property, Martha Perry, who testified that she was his mother and that she did in fact own the building located at 1493 Cusseta Avenue, Columbus, Georgia. She testified that she leased said building to Petitioner and he was in fact the lessee of said building on August 16, 1983 (V. I at T-22). Martha Perry testified that she did *not* have a set of keys to said building (V. I at T-23) but she did testify that it was open to the public as a business during business hours (V. I at T-28, T-29). She also testified that as far as she knew, anyone could just walk in there during the day (V. I at T-29).

Petitioner would only note in passing that this search took place at night, after business hours and after the business was closed.

Richard Sumbry, a karate instructor, testified (V. I at T-29) that Petitioner was the general manager of the business and that the business license and certificate of occupancy is in the name of Lewis Perry (V. I at T-30).

Sumbry testified that only three people had keys to the building, without objection. He testified that the building is open to the public generally six days a week from 11:00 a.m. to 8:30 p.m. and then the studio is locked up (V. I at T-31). However, he said that on August 16, 1983, the last class was over early and the building was closed and locked up at 7:15 p.m. (the search took place at approximately 8:30 p.m.). Mr. Sumbry further testified that even during the business hours there are certain areas where the public is not permitted except under certain conditions (V. I at T-33 - T-37).

Sumbry testified that once the business is closed for the day and the building locked up, only Sumbry, Miss Dickie and Mr. Perry had the keys to it, and that those three jointly had the right to exclude others from the premises during the business hours (V. I at T-38). Mr. Sumbry further testified that after the building is closed there is an expectation of privacy (V. I at T-40).

As far as whether or not there was a search of the premises, during said hearing counsel for Petitioner attempted to call Lt. Griffin but counsel for the government objected to this saying "I think we ought to have standing first." (V. I at T-33). The Court, obviously intent on whether or not Petitioner had the authority to exclude other persons, required counsel for Appellant to bring back another witness on that point (V. I at T-33 - T-35). Sumbry once again elaborated on the expectation of privacy insofar as those premises were concerned, but also gave details of the condition in which he found the building after the search had taken place (V. I at T-37 - T-40). Counsel for Petitioner even made a proffer that he would expect to show that the officers conducted a search without a warrant (V. I at T-42) but was once again cut off by

the Court and informed by the Court that "I don't see that there is any standing from the testimony of the witnesses I've heard. I don't see that this man by their testimony has shown standing." And further "Since I have determined you don't have standing, then the government doesn't have any burden at all in the circumstances, as I see it."

REASONS FOR GRANTING THE WRIT

This Court should grant this Petition for Certiorari and reverse the United States Court of Appeals for the Eleventh Circuit because this decision is in conflict with several other decisions of other circuits and sets an impossible precedent for defendants showing "standing" without taking the witness stand.

The Trial Court and Court of Appeals completely ignored Defendant's Exhibit #1 (V. I at T-31), a certificate of occupancy in the name of Lewis Perry issued by the City of Columbus. Said certificate of occupancy was issued to Mr. Perry as the owner of the business which occupied the premises searched.

Likewise, the Trial Court and the Court of Appeals ignored Defendant's Exhibit #2, the same being a business license in the name of Lewis Perry for the business occupying the premises searched (V. I at T-31).

Both of these exhibits were tendered and admitted without objection (V. I at T-31).

While no one factor is per se determinative on the issue of a person's legitimate expectation of privacy in the premises searched, the Supreme Court in *Rakas* indicated that the fact that one "owns or lawfully possesses or controls property" is a highly influential factor (*Rakas*

v. Illinois, 439 U.S. 128 (1978) (Powell, C.J., concurring); *Brown v. U. S.,* 411 U.S. 223 (1973) (actual standing will be granted only if the defendant can show that he has a "substantial" proprietary or possessory interest in the premises searched or the property seized); *People v. Savage,* 630 P.2d 1070 (Colo. 1981) (defendant who lived in trailer with four others and shared rent equally had substantial possessory interest in premises)).

When the owner has leased the premises or property, the lessee gains the primary possessory interest in the premises, and therefore has the same right to challenge a search of the premises as the owner (*U. S. v. Houltin,* 525 F.2d 943 (5th Cir. 1976), vacated on other grounds, 429 U.S. 1034 (1977); *People v. Smith,* 136 Cal. Rptr. 764 (Cal. App. 1977) (owner who leased plane cannot give consent to a search of the plane, as the lessee has control); *People v. DuPree,* 538 P.2d 121 (Colo. App. 1975) (defendant's status as lessee gave him substantial possessory interest in the premises, and this interest was unaffected by length of absence from the premises); *Cf. U. S. v. Taylor,* 515 F.Supp. 1321 (D. Me. 1981) (defendants failed to show a possessory interest in the vessel at the time it was discovered, as their lease in the yacht had expired)).

During the trial, Hinton, Jr., testified that on August 16, 1983, at approximately 8:30 p.m., the karate studio was closed, and neither he nor his father could go inside the studio until Petitioner Perry got there. He testified Perry came and unlocked the door and allowed them inside (V. II at T-194). Hinton, Sr. testified that Perry locked the door after all parties came in and had to unlock it again so Hinton, Jr. could go out the door (V. II at T-52). This all occurred after closing hours and clearly indicates control by Petitioner.

Additionally, the Trial Court, in its finding of facts filed on remand held:

> One of the difficulties at the suppression hearing resulted from the cirumstance that the moving party never established that there was a search, must less the particular location within the building, which was supposedly searched.

Petitioner, insofar as whether or not a search of the premises was conducted, attempted to call Lt. Griffin, but Sam Wilson, attorney for Appellee, objected saying "I think we ought to have standing first." (V. I at T-33). The Trial Court, obviously intent on whether or not Appellant had the authority to exclude other persons, said, "What do you say, Mr. Swearingen, to the fact that the witnesses did testify, one witness testified it was a place open to the public and another witness testified that Mr. Perry didn't have any authority to exclude people from the premises."

Later, after recalling Richard Sumbry, a colloquy transpired (V. I T-41) which effectively cut Appellant off from calling any other witnesses (V. I T-42).

> "Mr. Swearingen: But Your Honor as a proffer we would expect to show that the officers conducted a search without a warrant and—
>
> "The Court: Of course I haven't heard anything about that. You gentlemen apparently know all about it, but I don't."

Finally, at the end of the hearing, the following colloquy transpired (T-44):

> "Mr. Swearingen: Would Your Honor feel perhaps better if we went ahead and as proffer brought on the other evidence that we will put on in

support of our contention that the search is illegal?

The Court: Well, if you don't have standing, we don't get to that. What's your view about that Mr. Wilson?

Mr. Wilson: My view of that is correct, Your Honor. Without standing there is no motion because there is no controversy of which the defendant is a part.

The Court: That's the way I see it. All right, we'll be in recess at this time."

Petitioner offers the foregoing observations in support of his contention that the Trial Court in findings of fact on remand, completely ignored or failed to read the foregoing portions of the transcript.

Likewise, Petitioner respectfully submits that the Court of Appeals has either ignored the afore-cited portions of the transcript or failed to read them.

Petitioner submits that the Court's decision in the case sub judice makes bad law. In its decision the Court has now allowed the Trial Courts in this circuit to summarily make a finding of "no standing" solely on the basis of credibility without government evidence or impeachment.

By way of example, assume that Petitioner had taken the stand and testified that he leased the building from his mother, that he had a business license (Exhibit 2), that he had a certificate of occupancy (Exhibit 1), that he had issued the keys to the aerobics instructor and the karate instructor and that those were the only two keys besides his and the building was closed until such time as he unlocked it and let in Hinton, Jr. and Hinton, Sr.

This would show an absolute "reasonable expectation of privacy." However, it was not, in Petitioner's judgment, necessary for Petitioner to take the stand because all of this was established, without objection, by other witnesses and exhibits.

However, in the case sub judice, even had Petitioner Perry testified, the Trial Court could make a finding of "no standing" on the issue of "credibility" by simply saying, "Well, I don't believe the Defendant, he is not credible, and therefore I am going to find he has no standing and therefore he has no right to file a motion to suppress."

Another aspect of this Court's decision that Petitioner respectfully complains of is the fact that this Court did not see fit to issue any guidelines as to what is required to make a showing of standing and to make a "credible showing." Petitioner respectfully begs this Court to formulate and issue some sort of guidelines.

It is respectfully submitted that the Trial Court ignored the precedent of *United States v. Congote*, 656 F.2d 971 (1981); *U. S. v. Torres*, 705 F.2d 1287 (1983); *U. S. v. Berrong*, 712 F.2d 1370 (1983); *United States v. Dunn*, 674 F.2d 1093 (5th Cir. 1982); *United States v. Buchanan*, 683 F.2d 423 (5th Cir. 1980), and *U. S. v. Bachner*, #81-6203, decided June 6, 1983 (11th Cir.).

In *United States v. Congote*, 656 F.2d 971 (1981), there is a major discussion of the standing rule and the changes that have taken place in the Supreme Court rulings over the recent past.

> In recent years, the Supreme Court has staged a massive retreat from the automatic standing rule of Jones v. U. S., 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). In Jones, the Court held that persons charged with crimes of possession need not prove the violation

of their own constitutional rights to have standing. They must only demonstrate that the seizure of the incriminating evidence violated the fourth amendment. The Court began its withdrawal from Jones in Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). The Rakas Court held that a defendant could not invoke the exclusionary rule unless the alleged unconstitutional search had invaded his own legitimate expectation of privacy. The government argues in the instant case that appellant has no standing to assert the fourth amendment violation that occurred when Brock and Marszalkowski were arrested. We agree because appellant had no expectation of privacy in Marszalkowski's apartment. Indeed, he had never been there and did not even know the address. This opinion is buttressed by three recent cases in which the Supreme Court expressly overruled the Jones automatic standing rule.

In U. S. v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 67 L.Ed.2d 619 (1980), the appellants were convicted of possessing stolen mail. The police located the incriminating evidence during an allegedly unconstitutional search of the apartment of one defendant's mother. The district court and the First Circuit accepted defendants' automatic standing argument and excluded the incriminating evidence. The Supreme Court remanded the case for a determination of whether either or both defendants possessed a legitimate expectation of privacy in the apartment. Similarly in Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980), the owner of drugs located during an unconstitutional search of another's purse could not benefit from the violation of the purse-owner's fourth amendment rights. The Court stated

that the defendant had no expectation of freedom from government intrusion into the purse. Finally, in U.S. v. Payner, 447 U.S. 727, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980), the Court found the defendant taxpayer to have no legitimate expectation of privacy in a loan guaranty agreement illegally seized from the briefcase of his banker. Thus, although the arrest, entry into the apartment, and the act of answering Marszalkowski's telephone may all have been illegal, these violations will not serve to exclude appellant's statements. He had no legitimate expectation of privacy in the apartment.

In the recent case of *United States v. Torres*, 705 F.2d 1287 (11th Cir. 1983), the Court continues the discussion of expectation of privacy and the requirements that have to be met to successfully challenge a search when it stated:

> The right to challenge a search or seizure as a violation of the fourth amendment turns on "whether the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). Rakas shifted the focus of the standing question from whether an individual was an object of a search or seizure, to whether the individual's right to privacy in either the place searched or in the repository of the seized evidence was violated by the warrantless search and seizure. This focus requires a determination of "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." 439 U.S. at 140, 99 S.Ct. at 429, 58 L.Ed.2d at 399.
>
> Appellants bear the burden of establishing that they had a legitimate expectation of privacy in the areas

searched. Rakas v. Illinois, 439 U.S. at 130 n.1, 99 S.Ct. at 424 n.1, 58 L.Ed.2d at 393 n.1; U. S. v. Meyer, 656 F.2d 979 (5th Cir. 1981). Our review of appellants' claims thus entails an assessment of whether, viewing the evidence in the light most favorable to the government, appellants met their burden of proof. This determination of the legitimacy of appellants' claims to privacy from government intrusion requires a look at all the surrounding circumstances. Rakas v. Illinois, 439 U.S. at 152, 99 S.Ct. at 435, 58 L.Ed.2d at 406 (Powell, J., concurring).

On appeal, Gomez urges that he had a sufficient privacy interest in the truck to invoke the fourth amendment. Gomez argues that a key element in assessing one's legitimate expectation of privacy in an area is the individual's right to exclude others from that area. He contends that he was hired by the truck's owner to secure the marijuana and to remain in the truck with the doors closed. He further argues that he had temporary possession of the property as a bailee, essentially asserting that he was the transferee of the truck owner's right to privacy.

In the recent case of *United States v. Berrong*, 712 F.2d 1370 (11th Cir. 1983), this Court recently took up the long-standing controversy over how important a part the defendant's property rights play in the ability to claim reasonable expectation of privacy:

As a general rule, the applicability of the Fourth Amendment does not focus on the question whether an area or a place is constitutionally protected, Katz v. U. S., 389 U.S. 347, 350, 88 S.Ct. 507, 510, 19 L.Ed.2d 576 (1967), but rather whether the defendant can claim a "reasonable expectation of privacy." Katz

v. U. S., 389 U.S. at 360, 88 S.Ct. at 516 (Harlan, J., concurring); Smith v. Maryland, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979). Analysis of such expectation proceeds in two parts, First, it must be determined whether the defendant "has shown that 'he seeks to preserve [something] as private.'" Smith v. Maryland, 442 U.S. at 740, 99 S.Ct. at 2580 (quoting Katz v. U. S., 389 U.S. at 351, 88 S.Ct. at 511). Second, it must be determined whether the defendant's subjective expectation of privacy is "one that society is prepared to recognize as 'reasonable.'" Katz v. U. S., 389 U.S. at 361, 88 S.Ct. at 516-517 (Harlan, J., concurring).

The question whether appellant Berrong exhibited a subjective expectation of privacy need not detain us because, applying the second prong of the Katz test, we conclude that the expectation, if any, was not reasonable. "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Rakas v. Illinois, 439 U.S. at 143 n.12, 99 S.Ct. at 431 n.12. Binding precedent clearly states "that there is no legitimate expectation of privacy in outbuildings and open fields, even if fenced, unless they are part of the curtilage, or the immediate appurtenances, of a home." U. S. v. Long, 674 F.2d 848, 853 (11th Cir. 1983); U. S. v. Williams, 581 F.2d 451, 453 (5th Cir. 1978). Although the distinction between the open fields and the curtilage of a home is not talismanic, U. S. v. Jackson, 588 F.2d 1046, 1053 n.12 (5th Cir.), cert, denied, 443 U.S. 941, 99 S.Ct. 2882, 61 L.Ed.2d 310 (1979), that distinction does reflect what expectations of privacy were reasonable in this case.

Petitioner submits that while property rights are not the sole deciding factor for Fourth Amendment protection, they still play a vitally important role in considering the issue of "standing." The Fifth Circuit Court of Appeals, in the case of *United States v. Dunn*, 674 F.2d 1093 (1982) stated the following:

> Although not specifically enumerated in the Constitution, the right of privacy long has been recognized. Property interests once were considered paramount in fourth amendment applications. See, e.g., Goldman v. U. S., 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942); Olmstead v. U. S., 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928). But as the Supreme Court observed in Rakas v. Illinois, its decision in Katz v. U. S., repudiated Olmstead and Goldman and "held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." 439 U.S. at 143, 99 S.Ct. at 430, 58 L.Ed. at 401. See U. S. v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977); U. S. v. White, 401 U.S. 745, 91 S.Ct. 1122, 28 L.Ed.2d 453 (1971). However, considerations of property interests are not irrelevant to the legitimate expectation of privacy analysis, for "by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property privacy interests protected by that Amendment." Rakas v. Illinois, 439 U.S. at 143 n.12, 99 S.Ct. at 431 n.12, 58 L.Ed.2d at 401 n.12. The decisional standard developed in Rakas traces Justice Harlan's suggestion in his concurrence in Katz; specifically, the individual asserting the privacy interest

must demonstrate an actual (subjective) expectation of privacy and the expectation must be in accord with societal notions of reasonableness.

In the case at bar, Petitioner leased the building located at 1493 Cusseta Avenue containing his business which was a karate and dance studio. Petitioner produced as a witness the owner of the property, Martha Perry, who testified that she was his mother and that she did in fact own the building located at 1493 Cusseta Avenue, Columbus, Georgia. She testified that she leased said building to Petitioner and he was in fact the lessee of said building on August 16, 1983 (V. I at T-22). Martha Perry testified that she did *not* have a set of keys to said building (V. I at T-23) but she did testify that it was open to the public as a business during business hours (V. I at T-28 - T-29). She also testified that as far as she knew, anyone could just walk in there during the day (V. I at T-29).

Petitioner would only note in passing that this search took place at night, after business hours and after the business was closed.

Richard Sumbry, a karate instructor, testified (V. I at T-29) that Petitioner was the general manager of the business and that the business license and certificate of occupancy is in the name of Lewis Perry (V. I at T-30). Sumbry testified that only three people had keys to the building, without objection. He testified that the building is open to the public generally six days a week from 11:00 a.m. to 8:30 p.m. and then the studio is locked up (V. I at T-31). However, he said that on August 16, 1983, the last class was over early and the building was closed and locked up at 7:15 p.m. (the search took place at approximately 8:30 p.m.). Mr. Sumbry further testified that even during the business hours there are certain areas where

the public is not permitted except under certain conditions (V. I at T-33 - T-37).

Sumbry testified that once the business is closed for the day and the building locked up, only Sumbry, Miss Dickie and Mr. Perry had the keys to it, and that those three jointly had the right to exclude others from the premises during the business hours (V. I at T-38). Mr. Sumbry further testified that after the building is closed there is an expectation of privacy (V. I at T-40).

As far as whether or not there was a search of the premises, during said hearing counsel for Petitioner attempted to call Lt. Griffin but counsel for the government objected to this saying "I think we ought to have standing first." (V. I at T-33). The Court, obviously intent on whether or not Petitioner had the authority to exclude other persons, required counsel for Appellant to bring back another witness on that point (V. I at T-33 - T-35). Sumbry once again elaborated on the expectation of privacy insofar as those premises were concerned, but also gave details of the condition in which he found the building after the search had taken place (V. I at T-37 - T-40). Counsel for Petitioner even made a proffer that he would expect to show that the officers conducted a search without a warrant (V. I at T-42) but was once again cut off by the Court and informed by the Court that "I don't see that there is any standing from the testimony of the witnesses I've heard. I don't see that this man by their testimony has shown standing." And further "Since I have determined you don't have standing, then the government doesn't have any burden at all in the circumstances, as I see it."

Petitioner submits that he proved "standing." He had a leasehold interest in the property as proved by the

lessor, and he had an expectation of privacy as shown by the testimony of his business associate. At the very least, he crossed the threshold to show standing.

Petitioner submits it is unconscionable to allow a trial court to pass off unimpeached testimony and Exhibits (V. I T-5) by holding it was not "credible." What yardstick do we use to determine what is or is not credible, who is or is not a credible witness.

Petitioner asks, what is so farfetched about a Grade 6 Civil Service employee paying $226.00 per month to purchase a building (V. I T-24), especially when she receives $250.00 per month rent from the lessee/Petitioner who just happens to be her son?

Furthermore, the government called no rebuttal witness such as the realtor T. L. Lowe who arranged the purchase (V. I T-25) by Mrs. Perry.

In the case of *United States v. Buchanan*, 683 F.2d 423 (5th Cir. 1980), the Court pointed out the importance of a current lease in determining the defendant's right to privacy in an area searched when it stated:

> On April 15, Buchanan had failed to pay the monthly rent for the searched premises. The lease expired by its own terms five days after the non-payment of rent. On May 5, 1979, the landlord changed the locks on the doors of the premises. Since Buchanan had no further property interest in the premises once the lease had expired, and since he was not present at the premises when they were searched, he had no legitimate expectation of privacy in the premises and thus no standing to challenge the search. Rawlings v. Kentucky, ... U.S. ....., 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421,

58 L.Ed.2d 387 (1978); Katz v. U. S., 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

Petitioner asks this Court to note that no questions were asked by the government counsel about the existence of a lease, nor was any demand made by government counsel to produce a lease; there was only unrebutted testimony about a lease without objections.

Petitioner submits that in the case of *Rakas, supra*, the United States Supreme Court stated:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is a right to exclude others, see W. Blackstone, Commentaries, Book 1, Chapter 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.

Petitioner submits that where the premises are rented and controlled by him and are in his possession, he has standing to attack the search. Petitioner submits that "possession" is to have reference to an unrestricted right of occupancy or custody and control of the premises as distinguished from occasional presence on the premises as a mere guest or invitee. Petitioner submits the evidence was unrebutted that he had one of three sets of keys to the premises and that the other two sets of keys to the premises had been given by Petitioner to two of his employees. Certainly, as general manager and as licensee of the business, Petitioner had an unrestricted right of occupancy and control of the premises after business hours, if not even during business hours.

In the hearing on the motion to suppress evidence, the government never rebutted the Petitioner's evidence. All of it went unrebutted. Standing was shown.

In addition to the foregoing, Petitioner calls this Court's attention to the additional facts set out hereinbefore in the "Statement of facts necessary to argument of the issues."

Petitioner submits that he went beyond the

> ". . . threshold inquiry in a Fourth Amendment challenge in regard as to whether or not the challenger has a legitimate expectation of privacy in the invaded place." (*U. S. v. Glasgow*, 656 F.2d 1036, 1044 (5th Cir. Unit B, 1981); *United States v. Hawkins*, 681 F.2d 1343, 1344 (11th Cir. 1982)).

In addition, Petitioner more than complied with the examples set out by this Honorable Court in *United States v. Bachner*, #81-6203, 11th Cir., June 6, 1983:

> "The only evidence of record which goes to the 'reasonable expectation of privacy' issue is the appellee's presence at the site where the aircraft was searched. At the suppression hearing no evidence was adduced that the appellee had a reasonable expectation of privacy in the aircraft, as for example, that he owned or leased the subject aircraft or otherwise had an unrestricted right of occupancy or custody or control of said aircraft; nor was any evidence adduced that the appellee had a reasonable expectation of privacy in the contraband seized, for example, that he actually or constructively possessed subject quaaludes or whether lawfully or unlawfully."

Of course, the record clearly indicates that the Trial Judge neither allowed the Appellant to call any further witnesses nor go into the question of search and/or seizure.

Finally, this Court completely ignored Footnote 6 in the *Bachner, supra,* decision which held:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others. See W. Blackstone Commentaries, Book 1, Chapter 1, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. *Rakas v. Illinois,* 439 U.S. 128, 143, and 99 S.Ct. 421, 430, n.12, 58 L.Ed.2d 387 (1978).
>
> Where the premises searched is a dwelling or is owned or rented by or is in the possession of the accused, he has standing to attack the search. As employed in this connection we understand "possession" to have reference to the unrestricted right of occupancy or custody and control of the premises as distinguished from occasional presence on the premises as a mere guest or invitee. *State v. Leveson,* 151 So.2d 283, 285 (Fla. 1963).

Even the merest perusal of the entire record clearly indicates that the Defendant more than went beyond the "threshold inquiry" formally required by this Court and showed that he had standing to attack the search.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SWEARINGEN, CHILDS & PHILIPS, P.C.
By: JOHN C. SWEARINGEN, JR.
Attorney for Petitioner
Lewis T. Perry

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CERTIFICATE OF SERVICE

I, John C. Swearingen, Jr., attorney of record for the Petitioner, hereby certify that in accordance with the rules of the Supreme Court, I have this date served true and correct copies of this petition upon the Honorable Samuel Wilson, Assistant United States Attorney, by depositing a copy of the same in the United States Mail, with proper address and adequate postage to Post Office Drawer U, Macon, Georgia 31202, and Honorable Rex E. Lee, Solicitor General, United States Department of Justice, Washington, D. C. 20530.

This the 19th day of February, 1985.

JOHN C. SWEARINGEN, JR.
Of Counsel for Petitioner
Lewis T. Perry

SWEARINGEN, CHILDS & PHILIPS, P.C.
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APPENDIX

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Lewis T. PERRY, Defendant-Appellant,

No. 83-8695.

United States Court of Appeals,
Eleventh Circuit.

Aug. 29, 1984.

Defendant was convicted in the United States District Court for the Middle District of Georgia, J. Robert Elliott, J., of distributing cocaine and possessing cocaine with intent to distribute, and he appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) variance, if any, between indictment and proof at trial relative to whether defendant dealt with agent directly or indirectly was not fatal; (2) district court's failure to make findings of fact sufficiently specific to permit review of conclusion of law that defendant lacked standing to assert expectation of privacy in business premises searched required remand for further findings; and (3) trial court did not err in restricting cross-examination of government witness with respect to witness' prior cocaine-related conspiracy conviction.

Affirmed in part, reversed in part, and remanded.

Fay, Circuit Judge, concurred in part, dissented in part, and filed opinion.

1. Drugs and Narcotics (Key) 106

Though evidence established that defendant never openly discussed sale of cocaine with agent, did not give cocaine directly to agent, and did not receive money directly from agent, there was no variance between that proof and allegation in indictment that defendant knowingly and intentionally unlawfully distributed cocaine to the agent; evidence indicated defendant's awareness that agent was the intended recipient and that he was also source of some of the money involved. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

2. Criminal Law (Key) 1167(1)

Even if there were a variance between allegations in indictment and evidence adduced during trial on cocaine distribution charges, defendant failed to allege, much less demonstrate, any prejudice resulting from the asserted variance relating to whether he dealt with agent directly or indirectly. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

3. Criminal Law (Key) 1181

Because the district court failed to make findings of fact sufficiently specific to enable the Court of Appeals to review conclusion of law that defendant lacked standing to assert expectation of privacy in place of business searched, matter would be remanded for further findings in that regard.

4. Witnesses (Key) 350

District court did not err in restricting defendant's cross-examination of government witness relative to

amount of cocaine involved in witness' prior conspiracy prosecution, inasmuch as testimony already adduced on cross-examination, as well as direct examination, apprised the jury that witness had been convicted of participating in cocaine conspiracy, that he had received six-year prison sentence therefor, that he had not yet begun to serve that sentence, that he hoped for favorable treatment in return for his cooperation with narcotics officers, and that he had had 29 codefendants in the prior prosecution. U.S.C.A. Const.Amend. 6.

Appeal from the United States District Court for the Middle District of Georgia.

Before FAY, KRAVITCH and HATCHETT, Circuit Judges.

KRAVITCH, Circuit Judge:

In this appeal, Lewis T. Perry challenges his convictions under 21 U.S.C. § 841(a)(1) for distributing cocaine and for possessing cocaine with intent to distribute. For the reasons that follow, we affirm in part, reverse in part and remand.

I. BACKGROUND

In May 1983, Robert Hinton, Sr. and Robert Hinton, Jr., father and son, pleaded guilty to federal conspiracy charges arising from a large cocaine operation in Kentucky. Each was sentenced to a six-year prison term. After sentencing, but before service of the sentences had commenced, the Hintons agreed to work with narcotics officers in hopes of obtaining sentence reductions. Having been previously acquainted with Perry, the two traveled to Columbus, Georgia, and met with an agent of the Drug

Enforcement Administration and members of the Muscogee County Sheriff's Department. Evidence adduced by the Government at trial indicates that Perry and the Hintons were subsequently involved in three drug transactions.

The Hintons first dealt with Perry on June 23, 1983. Using money furnished by the Sheriff's Department, they purchased one once of cocaine from him for $1,550.

On June 30, 1983 the Hintons met with Gerald Chapman, an undercover DEA agent posing as a band manager named Jerry Carter. That evening, the three of them rendezvoused with Perry at the Municipal Auditorium in Columbus, ostensibly to discuss the sale of recording equipment. While there, Hinton, Sr. took Perry aside and exchanged $3,100, the price of two ounces, for a three-ounce package of cocaine. Then Hinton, Sr. took Chapman aside and handed over the package. When they returned, Chapman asked that Perry separate one ounce, but Perry refused to deal with Chapman openly. Instead, after taking Hinton, Sr. aside, Perry insisted that Hinton, Sr. get the remaining $1,550 from Chapman and bring it back to Perry. Hinton, Sr. did so, and they parted.

The third transaction occurred on August 16, 1983. Hinton, Jr. telephoned Perry in the morning and arranged to buy a pound of cocaine for $25,000. Around 6:30 p.m. the Hintons met Perry at the karate and dance studio which he managed and were told to call at his house in 45 minutes. Hinton, Jr. went to Perry's house as instructed, and Perry showed him a package of cocaine wrapped in a towel. Hinton, Jr. then informed Perry that they had only $20,000 and suggested that Perry take three ounces out of the pound. Agreeing, Perry told him to return to the studio in half an hour. Perry met the Hintons at the studio around

8:30 p.m., let them in, and told them that the cocaine would be coming. Shortly thereafter, Perry's codefendant, John Battle, arrived. Perry retrieved a brown paper bag from Battle's car and gave it to Hinton, Sr., who confirmed that it contained cocaine. Hinton, Jr. then went to get the money from the trunk of the Hintons' car, thereby signaling the authorities to move in. As agents approached, Perry tossed the cocaine through a hole in the ceiling into the rafters. The agents entered the studio, arrested Perry and Hinton, Sr., and seized the cocaine; Battle and Hinton, Jr. were arrested outside.

In an indictment returned on August 19, Perry was charged with three counts of violating 21 U.S.C. § 841(a)(1), each count corresponding with one of the three incidents recounted above. Count I alleged the distribution of cocaine on June 23; Count II alleged the distribution of cocaine to Chapman on August 30; and Count III, which also named Battle, alleged the possession of cocaine with intent to distribute on August 16.

Perry moved to suppress the evidence seized at the studio on August 16, i.e., the thirteen-ounce bag of cocaine. At the pre-trial hearing held on September 1, Perry presented the testimony of two witnesses, his mother and the karate instructor at the studio. The district court ruled from the bench that Perry had failed to establish standing and therefore denied the motion to suppress.

In the course of a three-day jury trial, Hinton, Jr. testified to his status as a government informant. On cross-examination, defense counsel inquired about his prior cocaine conspiracy conviction. Having elicited that there had been 29 other defendants in that case, counsel asked about the quantity of cocaine involved. The Government objected on relevancy grounds, and the district court ultimately sustained the objection.

As the jury was unable to reach a verdict on Count I, a mistrial was declared as to that count. Perry was found guilty on Counts II and III, and was later sentenced to two concurrent five-year prison terms followed by a five-year special parole term. Battle was also found guilty, and was given a two-year suspended sentence and three years' probation.

II. VARIANCE BETWEEN ALLEGATION IN INDICTMENT AND PROOF AT TRIAL

[1] Count II of the indictment alleges that Perry "knowingly and intentionally did unlawfully distribute to Gerald Chapman approximately three ounces of cocaine . . . ." Perry contends that he was entitled to a judgment of acquittal inasmuch as the evidence adduced at trial tends to show that on June 30, Perry distributed cocaine to Hinton, Sr., not Chapman. We disagree for two reasons. First, there is no variance between the allegation in question and the proof at trial. To be sure, the testimony of the Government's witnesses establishes that Perry never openly discussed the sale of cocaine with Chapman that Perry did not give the cocaine directly to Chapman, and that Perry did not receive the last $1,550 directly from Chapman. This testimony nevertheless indicates Perry's awareness that Chapman was the intended recipient of at least one-third of the cocaine and that Chapman was the source of at least one-third of the money. In short, the evidence suggests that Perry understood that he was dealing, albeit through an intermediary, with Chapman.

[2] Second, even if there were a variance in this case, the district court's failure to enter a judgment of acquittal would not be reversible error, for Perry has not alleged, let alone demonstrated, any prejudice resulting from the asserted variance. In *United States v. Cosby*, 529 F.2d

143 (8th Cir.), *cert. denied*, 426 U.S. 935, 96 S.Ct. 2647, 49 L.Ed.2d 386 (1976), the court observed:

> Fed.R.Crim.P. 52(a) provides that an error, defect, irregularity, or variance that does not affect substantial rights is to be disregarded. A variance between indictment and proof in a criminal case may prejudice a defendant substantially if it prevents him from presenting his defense properly, if it takes him unfairly by surprise, or if it exposes him to the risk of double jeopardy. But unless such a variance prejudices the defendant in one or more of those ways, it is not fatal.

Id. at 146. Similarly, in *United States v. Ramos*, 666 F.2d 469 (11th Cir.1982), this court noted:

> A variance warrants reversal solely if it is prejudicial, meaning that it affects substantial rights, "either by insufficiently informing him of the charges against him such that he is taken by surprise and prevented from presenting a proper defense, or by affording him insufficient protection against reprosecution for the same offense." *United States v. Juarez*, 573 F.2d 267, 278 (5th Cir.1978).

Id. at 477. Regardless of who is identified as the distributee, the allegation at issue plainly refers to the drug transaction which occurred at the Municipal Auditorium in Columbus on June 30. It is difficult to imagine how Perry would have presented his defense—that the four met to discuss the sale of recording equipment—differently or what other defenses he would have presented had Count II named Hinton, Sr. instead of Chapman. In addition, the trial transcript reflects no unfair surprise attributable to the wording of the allegation. Finally, we perceive no threat of double jeopardy. *See United States v. Lewis*, 426 F.2d 266, 267 (9th Cir.1970). Finding neither a variance

nor any prejudice, we hold that there was no reversible error in this regard.

III. DENIAL OF MOTION TO SUPPRESS

[3] Perry argues that at the suppression hearing, he succeeded in showing a reasonable expectation of privacy in the studio and that the district court therefore erred in denying the motion to suppress on standing grounds. Perry's proof consisted of the testimony of two witnesses. First, his mother testified that she owned the studio, that Perry operated it, that he rented it from her, and that she did not have a set of keys to it. Then the karate instructor at the studio testified that Perry was the general manager, that Perry was named on the business license and the certificate of occupancy, that the studio was generally open to the public until 8:30 p.m., and that it was closed around 7:15 p.m. on the evening of August 16. He also testified that only he, Perry and the dance instructor had sets of keys to the studio and that each of them had the right to exclude others.

At the conclusion of the hearing, the court stated:

> I don't think he has [established standing] either . . .
>
> * * *
>
> I don't think you've made the necessary showing about it.
>
> * * *
>
> I say I don't think you've made the necessary showing of an expectation of privacy, standing.
>
> * * *
>
> And I don't see there is any standing from the testimony of the witnesses I've heard. I don't see that this man by their testimony has shown standing.

Unfortunately, from these statements alone, we cannot discern the extent to which the testimony given was credited, if at all, or the facts upon which the ruling was based.

On the one hand, there were credibility questions with respect to both witnesses. On cross-examination, Perry's mother could not remember the purchase price of the studio and, having claimed to own a shopping center, could not remember its address. As the prosecutor explained in response to defense counsel's objections, "I'm testing the credibility of the woman." The karate instructor initially testified that Perry lacked the authority to exclude others; only after defense counsel had asserted the contrary to the court in his presence did the witness state that Perry had the right to exclude. In response to defense counsel's suggestion that the witness be sequestered, the court had observed, "it's too late. That's too late. He knows what you want him to say now."

On the other hand, the prosecutor argued that the testimony was insufficient to establish standing not because it was unworthy of belief, but because it did not relate to Perry's subjective expectation of privacy. At the conclusion of the testimony, the following colloquy took place:

> THE COURT: What do you say Mr. Wilson?
>
> MR. WILSON: I say there's still no standing, absolutely no standing whatsoever. No expectation of privacy, has been no testimony about the defendant, the movant in this motion, having an expectation of privacy in that place. In fact, it's operated as a business, they had chairs in there, people come and sit and look at what's going on. And unless the defendant can get on the stand and testify as to his expectaton of privacy, I submit that as of this moment there has been none established.

THE COURT: I don't think he has either, Mr. Swearingen.

Notwithstanding the dissent's contrary assertion, it is unclear from the hearing transcript whether the district court's ruling rested on a credibility determination a conclusion that the situation described by the witnesses could not support a legitimate expectation of privacy, or a combination of both. We are, of course, reluctant to speculate as to the actual basis of the ruling. And inasmuch as they may lead to different results, we are unable to dispose of Perry's claim by exploring all of the various possibilities. Because the district court failed to make findings of fact sufficiently specific to enable us to review its conclusion of law, we remand for further findings while retaining jurisdiction. *See United States v. Torres*, 720 F.2d 1506, 1510 (11th Cir.1983).[1]

IV. RESTRICTION OF CROSS-EXAMINATION

[4] Finally, Perry asserts that the district court erred in restricting his cross-examination of Hinton, Jr., specifically in sustaining the Government's objection to his questions regarding the amount of cocaine involved in Hinton, Jr.'s prior conspiracy prosecution. The standard governing claims of this sort was succinctly stated by the court in *United States v. Tolliver*, 665 F.2d 1005 (11th Cir.), *cert. denied*, 456 U.S. 935, 102 S.Ct. 1991, 72 L.Ed.2d 455 (1982):

> The extent of cross-examination with respect to an appropriate subject of inquiry is generally within the

---

1. As a result of our remanding, the admissibility of the evidence seized at the studio on August 16 remains an open question. Accordingly, we decline to address Perry's sufficiency of the evidence claim at this juncture.

> sound discretion of the trial court, and the trial court's decision will not be disturbed on review unless an abuse of discretion is present. There is, however, a sphere which a trial judge may not impinge, for the "discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth Amendment."

Id. at 1008 (citations omitted); *see also United States v. Sonntag*, 684 F.2d 781, 788 (11th Cir. 1981) ("as long as the limitation [of cross-examination] does not interfere with the defendant's right of confrontation, this ruling is also discretionary with the trial court"). In this case, we hold that the district court's limited interference with the cross-examination of Hinton, Jr. constituted neither an infringement of Perry's confrontation right nor an abuse of the court's discretion.

The evidence most damaging to Hinton, Jr.'s credibility was brought out on direct examination. Hinton, Jr. testified that he had recently been convicted of participating in a cocaine conspiracy, that he had received a six-year prison sentence, that he had not yet begun to serve that sentence, and that he hoped for favorable treatment in return for his cooperation with narcotics officers. He stated, "No promises were made, just only that things that were known by us and things that we did would help us—that they would be reported to the proper authorities that could help us." And he answered affirmatively the question, "You hope your sentence will be reduced?" The scope of cross-examination allowed was quite broad. Defense counsel elicited testimony regarding Hinton, Jr.'s prior felony convictions and sentences for food stamp fraud, possession of marijuana, and possession of cocaine. He also inquired briefly about the circumstances under

which the Hintons became involved with the DEA. With respect to the cocaine conspiracy in Kentucky, defense counsel established that Hinton, Jr. had had 29 codefendants. Indeed, the court ruled out but one line of questioning, that aimed at revealing the quantity of cocaine involved and similar details of the crime.

Perry contends that the amount of cocaine related to the severity of the crime, which in turn related to Hinton, Jr.'s prospects of early parole and early release, as well as sentence reduction, which in turn related to his motivations for testifying in the Government's behalf. In limiting cross-examination, Perry argues, the court improperly curtailed his efforts to challenge the witness' credibility. The problem with this assertion is two-fold. First, Hinton, Jr.'s testimony regarding the number of codefendants served to demonstrate the severity of the crime. Second, and more important, the district court's ruling by no means prevented defense counsel from exploring Hinton, Jr.'s motives with respect to avenues of relief other than sentence reduction, which the Government had already exposed on direct examination. Counsel was free to ask questions directly addressing such motives, but simply declined to do so. Emphasizing the prosecutor's reference to him as the Hintons' "source of supply" in opening, Perry also contends that his inquiry into the specifics of the cocaine conspiracy was necessary in order for him to dispell the implication that he had been involved in that conspiracy. Again, the court did nothing to hinder defense counsel's exploration of this topic. While he could not ask about the quantity of cocaine, he might well have asked whether Perry had participated in the earlier conspiracy. Hence we conclude that Perry was afforded sufficient cross-examination to satisfy the Sixth Amendment.

In ruling in the Government's favor, the district court declared:

> There's no use in trying that case. He's—he admits that he pled guilty and it's a felony charge, says he got a six-year sentence. So I don't see why we'd be interested in the details of the offense.
>
> * * *
>
> I don't see where it has any relevance here though.

Having determined that the evidence was irrelevant, perhaps loath to confuse the jury by retrying an unrelated case, and perhaps motivated "by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," Fed.R.Evid. 403, the district court was certainly justified in restricting cross-examination as it did. Thus we conclude that the court acted well within the scope of its discretion.

AFFIRMED in part, REVERSED in part and REMANDED for further findings.

FAY, Circuit Judge, concurring in part and dissenting in part:

While fully agreeing with most of that which Judge Kravitch has written for the court, I respectfully dissent from her conclusion in part III dealing with the denial of the defendant's motion to suppress. Although the trial judge's comments could have been more detailed, my interpretation of his ruling is that he placed little or no credence in the testimony of the witnesses on this issue. It seems to me that such is clear from the record. I would affirm the convictions in all respects.

APPENDIX B

UNITED STATES of America,
Plaintiff-Appellee,

v.

Lewis T. PERRY, Defendant-Appellant.

No. 83-8695.

United States Court of Appeals,
Eleventh Circuit.

Nov. 13, 1984.

Defendant was convicted in the United States District Court for the Middle District of Georgia, J. Robert Elliott, J., of distributing cocaine and possessing cocaine with intent to distribute, and he appealed. The Court of Appeals, 740 F.2d 854, affirmed in part, reversed in part, and remanded. On remand, the United States District Court for the Middle District of Georgia entered additional findings of fact concerning prior determination that defendant failed to establish standing to contest search of karate studio. The Court of Appeals held that: (1) defendant failed to demonstrate requisite expectation of privacy to establish a standing to challenge search of studio and admission of seized evidence in context of a Fourth Amendment claim, and (2) evidence sought to be suppressed, package of cocaine, combined with other evidence adduced at trial, was sufficient to enable jury to reasonably conclude that defendant was guilty beyond a reasonable doubt.

Affirmed.

1. Criminal Law (Key) 394.5(2)

Searches and Seizures (Key) 7(26)

Defendant, who claimed no ownership of and expressed no expectation of privacy in cocaine or paper bag, failed to demonstrate requisite expectation of privacy in karate studio to establish standing to challenge search of studio and admission of cocaine seized from studio in context of Fourth Amendment claim. U.S.C.A. Const. Amend. 4.

2. Drugs and Narcotics (Key) 123(2, 3)

Evidence sought to be suppressed, a package of cocaine, combined with other evidence adduced at trial, was sufficient to enable jury to reasonably conclude that defendant was guilty beyond a reasonable doubt of distributing cocaine and possessing cocaine with intent to distribute.

Appeal from the United States District Court for the Middle District of Georgia.

Before FAY, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM:

In this case appellant Lewis Perry appealed his drug conviction on four grounds: (1) that there was a variance between the allegations in the indictment and the proof at trial, (2) that the district court judge unduly restricted his cross-examination of a government witness, (3) that the judge erred in denying his motion to suppress evidence based on lack of standing to challenge the warrantless entry and search of the building in which Perry was arrested and in which the cocaine was discovered, and (4) sufficiency of the evidence.

In our prior opinion in this case, *United States v. Perry,* 740 F.2d 854 (11th Cir. 1984) we held that the first two grounds (variance and cross-examination) were without merit. Because we found that the district court failed to make findings of fact sufficiently specific to enable us to review its conclusion on the suppression issue, we remanded for further findings and retained jurisdiction. *See United States v. Torres,* 720 F.2d 1506 (11th Cir.1983). Accordingly we also deferred consideration of Perry's insufficiency of evidence claim. The district court's order on remand having been filed in this court, we now decide Perry's fourth amendment and sufficiency claims.

At the suppression hearing two witnesses, Perry's mother and a karate instructor, testified as to ownership of and control over admission to the building as relating to Perry's expectation of privacy in the studio. From the Order on Remand, appended to this opinion, it is clear that the district judge found the testimony of neither witness credible.

[1] The record supports the trial court's credibility determination; hence we agree with the court below that Perry failed to demonstrate the requisite expectation of privacy to establish standing to challenge admission of the evidence in the context of a fourth amendment claim. We thus affirm the district court's denial of the motion to suppress.[1]

[2] Having held that the evidence sought to be suppressed was properly admitted, we conclude that, based upon the record, the evidence was sufficient to support the jury's verdict of guilt. The evidence sought to be

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1. The court further found that the defense failed to establish at the hearing that there was an illegal entry into or search of the building or of any particular location. Because of our ruling on lack of credibility we need not address this conclusion.

suppressed, combined with the other evidence adduced at trial, *see United States v. Perry, supra,* was sufficient to enable a jury to reasonably conclude that Perry was guilty beyond a reasonable doubt. *United States v. Bell,* 678 F.2d 547 (5th Cir. Unit B 1982) (en banc).

Having held all grounds to be without merit, we affirm the conviction.

AFFIRMED.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

UNITED STATES OF AMERICA	)	CRIMINAL NO:
	)	83-317-COL
	)	
vs.	)	
	)	
LEWIS PERRY	)	COURT OF
	)	APPEALS NO:
	)	83-8695

FINDINGS OF FACT

ELLIOTT, District Judge.

The United States Court of Appeals for the Eleventh Circuit has remanded the above captioned case to this Court for findings of fact concerning a prior determination that the Defendant failed to establish his standing to contest what he described as a search of a karate studio.

Defendant Perry filed a Motion to Suppress a brown paper bag containing cocaine seized on August 16, 1983 supposedly as a result of a search of a business located

at 1493 Cussetta Avenue, Columbus, Georgia. As the moving party, Defendant Perry had the burden of establishing that he had a legitimate expectation of privacy in the item seized or the particular area searched. *Rakas v. Illinois,* 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978); *United States v. Meyer,* 656 F.2d 979 (5th Cir.1981), *cert. denied,* [..... U.S. .....] 104 S.Ct. 507, [78 L.Ed.2d 697] (1984) [1983].

The Defendant claimed no ownership of and expressed no expectation of privacy in the cocaine or the paper bag. In an attempt to establish the required expectation of privacy in the place allegedly searched, Defendant called two witnesses, his mother, Mrs. Martha Perry and Mr. Richard Sumbry, a person who was employed at the building.

The Defendant's mother testified that she owned the building and leased it to the Defendant at $250.00 per month. The witness, a Grade 6 Civil Service employee at Fort Benning, could not recall the purchase price of the building and produced no deeds, leases, rental agreements or rent receipts. She was not a credible witness.

Mr. Sumbry testified that he was employed at the building. He stated that three persons possessed keys to the building: the Defendant, a female aerobic dance instructor, and himself. The witness did not state how he possessed this knowledge. If Mr. Sumbry issued the keys, then he, not the Defendant, would be the ultimate arbiter of who could or could not enter the building. If someone other than Mr. Sumbry issued the keys, Sumbry's testimony would be hearsay. Neither possibility advances the claim of Defendant's expectation of privacy.

In addition, Mr. Sumbry first answered, "Not really, no, Sir," to the question, "Does Lewis Perry have a right

to exclude everyone from that studio, tell them to get out?" After a conversation among this judge and all counsel in the presence of the witness concerning the testimony, the Court permitted Defense Counsel to recall Mr. Sumbry at which time he stated that the three persons with keys had authority to exclude people from the building. Mr. Sumbry, likewise, was not a credible witness.

One of the difficulties at the Suppression Hearing resulted from the circumstance that the moving party never established that there was a search much less the particular location within the building which was supposedly searched. Later, at trial, the government established that DEA Agents then in the process of arresting Defendant Perry saw Perry throw the package of cocaine into an opening in the ceiling of the building. The officers retrieved the package. This evidence was not produced until after the Suppression Hearing.

The Motion to Suppress is and was denied because the witnesses called by the Defendant were not credible, and the defense failed to establish at the Hearing that there was an illegal entry into or a search of the building or a search of any particular location therein. Thus, even if the two witnesses had been credible, there was no legitimate expectation of privacy established in the place searched because neither the search nor the place were proved at the Hearing.

SO ORDERED on the first day of September, 1983, and so stated this 17 day of September, 1984.

(Filed November 13, 1984)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8695

D.C. Docket No. 83-317
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEWIS T. PERRY,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

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Before FAY, KRAVITCH and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: November 13, 1984

For the Court: Spencer D. Mercer,
Clerk

By: /s/ (Illegible)
Deputy Clerk

ISSUED AS MANDATE

APPENDIX C

(Filed December 20, 1984)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-8695

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LEWIS T. PERRY,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion November 13, 11 Cir., 1984, ... F.2d .....).
(December 20, 1984)

Before FAY, KRAVITCH and HATCHETT, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge